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No. 93-1755

In The

Supreme Court of the United States

October Term, 1993

MOBIL OIL CORPORATION,

Petitioner,

v.

TOWN OF CYRIL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Cyril's C-1/C-3 cause of action accrued on October 10, 1989.

2. Whether the function performed by a municipal corporation is relevant to the determination of sovereign capacity as it applies to the *nullum tempus* doctrine.

3. Whether the Tenth Circuit abused its discretion by not certifying the immunity from limitations issue to the Oklahoma Supreme Court.

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STATUTORY PROVISIONS

The provisions of Okla. Stat. Ann. tit. 11, §37-115 (West Supp. 1994), are as follows:

> No person, firm, partnership, or corporation, or any of the partners, officers, managers, or employees thereof, shall pollute or permit the pollution of the water supply of a municipality, or any stream, pond, spring, lake,, or other water reservoir or groundwater aquifer, which is used or which is being held for use as a water supply by a municipality. A municipality may bring an action in the district court to enjoin any activity that will cause pollution of the water supply of a municipality whether or not such activity is regulated, licensed, or inspected. For the purposes of this section, the term pollution means contamination or other alteration of the physical, chemical, or biological properties of any natural waters of the state, or such discharge of any liquid, gaseous, or solid substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to the health, safety, or welfare of the general public, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, or fish or other aquatic life.

The provisions of Okla. Stat. Ann. tit. 11, §37-116 (West 1978), are as follows:

> A municipality shall have a right of action for damages resulting from pollution of its water supply, as provided in Section 37-115 of this title, and the measure of damages shall be the

> amount which will compensate for the detriment caused thereby, whether it could have been anticipated or not. Where such pollution is continued for a period of six (6) months or more, the injury shall be regarded as permanent.

The provisions of Okla. Stat. Ann. tit. 27A, §2 6-101(16) (West Supp. 1994), are as follows:

> 'Waters of the state' means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, storm sewers, and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through or border upon this state or any portion thereof, and shall include under all circumstances the water of the United States which are contained within the boundaries of, flow through or border upon this state or any portion thereof;

The provisions of Okla. Stat. Ann. tit. 27A, §2-6-102 (West Supp. 1994), are as follows:

> Whereas the pollution of the waters of this state constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life, and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water, and whereas the problem of water pollution of this state is closely related to the problem of water pollution in adjoining states, it is hereby declared to be the public policy of this state to conserve the waters of the state and to protect, maintain, and improve the quality thereof for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic,

agricultural, industrial, recreational and other legitimate beneficial uses; to provide that no waste or pollutant be discharged into any waters of the state or otherwise placed in a location likely to affect such waters without first being given the degree of treatment or taking such other measures as necessary to protect the legitimate beneficial uses of such waters; to provide for the prevention, abatement and control of new or existing water pollution; and to cooperate with other agencies of this state, agencies of other states and the federal government in carrying out these objectives.

STATEMENT OF THE CASE

Respondent, Town of Cyril[1] ("Cyril"), has utilized groundwater as its municipal water supply source for many years. For some years prior to 1948, Cyril obtained groundwater from its AB, AB-1, and AB-2 wells (collectively referred to as the "AB" wells) located near the east boundary of the NE/4 of Section 1.[2] R. Aplt. App.[3] at 60. During the period from 1948 to 1952, Cyril was forced to abandon the AB wells due to chloride pollution resulting

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[1] Pursuant to Rule 29.1, the Town of Cyril is a municipal corporation, but it has no parent companies or subsidiaries.

[2] For the Court's convenience, a well location map is included at App. 1. R. Aplt. App. at 70, 72, and 182.

[3] References to the Record below are cited as "R. Aplt. App." References to the appendix herein are designated by "App.", and citations to Petitioner's appendix are designated by "Petition App."

from the use of saltwater disposal pits associated with area oil and gas operations. *Id.* at 61-62.

After the loss of its AB wells in the NE/4 of Section 1, Cyril began obtaining groundwater from the A-1, A-2, A-3, A-4, and A-5 wells (collectively referred to as the "A" wells) located in the SE/4 of Section 1. *See*, App. 1. These wells all began to have elevated chloride levels[4] by 1966, and by 1975 all of the A wells, except A-4, had been abandoned because the chloride levels exceeded the 250 ppm standard set for public drinking water supplies. *Id.* at 62 and 71.

In December of 1980, Cyril obtained the water rights to 157 acres located in the NW/4 of Section 7 and drilled its C-1 well to a depth of 383 feet. *Id.* at 62, 122, and 138. Initially, the chloride concentration of 12 ppm at C-1 was well within the background range, but it gradually increased to 262 ppm by June of 1990. *Id.* at 72. Likewise, in March of 1986, Cyril obtained the water rights to 80 acres located in the W/2 of the NE/4 of Section 12 and drilled its C-3 well to a depth of 430 feet. *Id.* at 121 and 162. Although no chloride values were initially available at the time the C-3 well was drilled, the 1989 value of 20 ppm was still at the background level. *Id.* at 72.

In July of 1989, the Oklahoma State Department of Health undertook an investigation of Cyril's water supply. It was determined that because Cyril's C-1 and C-3 wells had experienced increased saltwater contamination

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[4] One way of measuring and expressing chloride concentration is "parts per million" (ppm). Natural background chloride levels in the subject area are in the 12 – 25 ppm range.

and were likely to be unusable in the future, an alternate source of supply was needed to safeguard the public health due to the likelihood of the complete loss of the present source. As a result, on October 10, 1989, Cyril was required by the Department of Health to obtain a new source of water supply to serve its residents. *Id.* at 112. Consequently, Cyril began purchasing its water at a cost which substantially exceeded its previous production costs and which resulted in substantial water rate increases for its residents.[5] *Id.* at 103. Because of the loss of its C-1 and C-3 wells, Cyril commenced the present action seeking compensation to offset the water rate increases for the benefit of itself and its residents. *Id.* at 1.

ARGUMENT

I. CYRIL'S C-1/C-3 CAUSE OF ACTION FIRST ACCRUED, AND THUS ITS STATUTE OF LIMITATIONS FIRST BEGAN TO RUN, ON OCTOBER 10, 1989.

Petitioner, Mobil Oil Corporation ("Mobil"), opens its "Reasons for Granting the Petition," and reiterates elsewhere, with the statement that Cyril filed suit more than *40 years* after its cause of action accrued. Petition at 6, 8, and 24. While such an unqualified statement is undoubtedly intended to invoke the sympathy of the Court, it is grossly misleading because Mobil fails to advise the Court that when Cyril's C-1/C-3 cause of action accrued

[5] Depending upon the amount of water used, the rate increases for Cyril's residents varied between 400 and 500 percent.

is a sharply contested issue. That was the primary issue on appeal, but since the Tenth Circuit held that the *nullum tempus* doctrine was applicable to the Cyril facts, it did not address when Cyril's C-1/C-3 cause of action accrued. *Town of Cyril v. Mobil Oil Corporation*, 11 F.3d 996, 998 n.5 (10th Cir. 1994). Had it done so, the Tenth Circuit would have easily concluded, based on the most fundamental of legal principles, that Cyril's C-1/C-3 cause of action first accrued on October 10, 1989.

A. Cyril's C-1/C-3 Cause of Action First Accrued When It First Sustained A Permanent Injury To Its C-1 and C-3 Wells.

The Cyril trial court ruled that Cyril's cause of action accrued when Cyril first learned that its water supply had sustained permanent damage. R. Aplt. App. at 299, *passim*. Although the trial court did not offer a specific date, presumably the accrual time corresponds to the period of time when Cyril was forced to abandon its AB wells (AB and AB-1 in 1948 and AB-2 in 1952) as the trial court specifically mentions the early 1950s and points out the statute of limitations had run decades prior to 1989 when Cyril was ordered to cease using its C-1 and C-3 wells. R. Aplt. App. at 305 and 308. There is no dispute that Cyril's AB causes of action accrued in the late 1940s and early 1950s because it was during that period that the AB wells sustained a permanent injury.[6] However, Cyril's

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[6] Like most other pollution injuries, a cause of action does not accrue until a groundwater injury becomes permanent. *Arkansas Fuel Oil Co. v. City of Blackwell*, 87 F.2d 50, 52 (10th Cir. 1936); *Harper-Turner Oil Co. v. Bridge*, 311 P.2d 947, 949 (Okla. 1957).

present claims are not based on the loss of its AB wells. Its cause of action is based on, and limited to, the loss of its C-1 and C-3 wells which involve totally separate and distinct water rights.

Since there is no evidence that the AB pollution in late 1940s and early 1950s extended beyond the AB well locations, the trial court's ruling leads to the absurd result that requires every landowner who might suffer a future injury to his water rights to file his action in 1948 at the time of the first permanent injury to the aquifer. Moreover, this result obtains regardless of how distant the landowner might be from the initial pollution site, regardless of the rate of groundwater/pollution movement,[7] and regardless of whether the landowner has sustained a presently-existing injury to his water rights.

It is well settled that a plaintiff's statute of limitations begins to run when his cause of action accrues, and the cause of action accrues when plaintiff first could have maintained his action to a successful conclusion. *Sherwood Forest No. 2 Corp. v. City of Norman*, 633 P.2d 368, 370 (Okla. 1980). It is equally well settled that without a presently-existing injury, a plaintiff has no cause of action. *Miller v. Cudahy Company*, 567 F.Supp. 892, 897-98 (D. Kan. 1983); *Harmon v. Harmon*, 527 P.2d 610, 613 (Okla. App. 1974) (a plaintiff has no actionable cause until damage has been sustained). If the trial court is indeed correct in ruling that Cyril's cause of action accrued in the 1950s, then it must necessarily follow that Cyril would have

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[7] In the present case, the rate of groundwater/pollution movement is estimated to be about 120 feet per year.

been obligated to bring and then successfully maintain its C-1/C-3 cause of action in the early 1950s. But in the 1950s Cyril neither owned the water rights on which its C-1/C-3 claims are based[8] nor was there any injury whatsoever to either the C-1 or C-3 well locations at that point in time. Therefore, absent these essential elements, Cyril could not have successfully maintained a C-1/C-3 cause of action at the time the trial court found its statute of limitations began to run.

Had Cyril filed its present action in the 1950s as the trial court suggests, it would have found itself in the same predicament as that of some of the *Miller* plaintiffs – without a presently-existing injury, there is no cause of action. *Miller,* 567 F.Supp. at 897-98. Plaintiffs in *Miller* were landowners and lessees who brought an action alleging that defendants' long-time salt manufacturing operation had polluted their groundwater by creating a large saltwater plume underlying their property. *Id.* at 894. Some of the plaintiffs had property clearly within the plume area, others were partially within the plume area, while still others were just beyond the leading edge of the slowly-moving plume of saltwater pollution. *Id.* at 897.

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[8] Cyril acquired the C-1 water rights in December of 1980 and the C-3 water rights in March of 1986. R. Aplt. App. at 122 and 121. Prior to those times, Cyril did not own the legal right to bring its present cause of action because it did not have any interest in these property rights. *Oklahoma Alcoholic Beverage Control Board v. Parkhill Restaurants, Inc.*, 669 P.2d 265, 268 (Okla. 1983); *In the matter of the Guardianship of Randall,* 569 P.2d 549, 551 (Okla. App. 1977) (a party must assert his own legal rights and interests and cannot rest his claim to relief on rights or interests of third parties).

Defendant moved for summary judgment as to those plaintiffs whose property was beyond the leading edge of the plume and whose property had not yet sustained an injury. These "prospective" plaintiffs argued that although the leading edge of the heavily-polluted saltwater plume had not yet reached their property lines, it was certain to do so in the near future and thus, they were entitled to reduce their future claims to a present claim for damages. The *Miller* court disagreed and held that even though these properties may be damaged in the future, since there was no evidence of a presently-existing injury to these plaintiffs' property rights, defendant was entitled to summary judgment because there was no triable issue of fact.[9] *Id.* at 898.

It is readily apparent that if Cyril's C-1/C-3 cause of action accrued decades ago, Cyril should have filed its present action decades ago. Had Cyril, or more properly the owners of the C-1 and C-3 water rights at that time, done so, it would have been in precisely the same position as the *Miller* plaintiffs who were dismissed because they had not yet sustained an injury. Even assuming Cyril knew unequivocally that the pollution would reach these well locations, like the dismissed *Miller* plaintiffs, Cyril had no C-1/C-3 cause of action in the 1950s because it sustained no permanent injury until October of 1989 when the Department of Health ordered Cyril to abandon its C-1 and C-3 wells.

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[9] Oklahoma law is consistent with the black letter law of *Miller*. *See, e.g., Collis v. Ashland Oil and Refining Company*, 722 F.2d 625 (10th Cir. 1983); *Arkansas Fuel*, 87 F.2d 50; *Cities Service Gas Co. v. Eggers*, 186 Okla. 466, 98 P.2d 1114, Syll. 12 (1940).

B. There Is No Causal Connection Between The Pollution Of The AB Wells and the Loss of the C Wells.

In its Complaint, Cyril alleged that the Rush Springs Aquifer was the source of its water supply for its C-1 and C-3 wells. R. Aplt. App. at 6. Since that time, however, extensive field work carried out on behalf of Mobil has revealed that there is an impermeable shale barrier underlying the Rush Springs Aquifer at about 100 feet below land surface. *Id.* at 185-192. If Mobil's expert is indeed correct about the impermeability of this shale barrier, then whatever early pollution had reached the Rush Springs Aquifer and caused the loss of Cyril's AB wells will remain confined in the Rush Springs Aquifer because the impermeable shale barrier effectively precludes movement of the pollution into the underlying Marlow Formation from which Cyril's C-1 and C-3 wells draw their water. *Id.* Thus, to the extent that Cyril's AB wells became polluted from saltwater disposal pits and the pollution is precluded from moving vertically through the impermeable barrier at 100 feet, then the initial loss of Cyril's AB wells cannot trigger the statute of limitations with respect to the loss of Cyril's deeper C-1 and C-3 wells because there is no causal connection between the loss of the AB and C wells.

II. THE COURT OF APPEALS' FINDING THAT THE *NULLUM TEMPUS* DOCTRINE IS APPLICABLE TO THE TOWN OF CYRIL IS CONSISTENT WITH OKLAHOMA PRECEDENT.

A. *Metropolitan Railroad* Has No Application To The Town of Cyril.

Apparently, Mobil cites *Metropolitan Railroad Co. v. District of Columbia*, 132 U.S. 1 (1889) for the proposition that the *nullum tempus* doctrine does not apply to an assumpsit action in the District of Columbia in the late 1800s. Aside from being one hundred years later, the law in the District of Columbia is quite different from the law in Oklahoma. Consequently, a conflict over a question controlled by state law (or law of the District of Columbia) is not a ground for granting certiorari, because such a conflict is merely corollary to a permissible difference of opinion between state courts. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1937).

In addition, Cyril is not bringing an assumpsit action. It is suing for the total destruction and loss of its municipal water supply. Cyril seeks to protect its water rights held in trust for the public, and it has long been declared public policy in Oklahoma that:

> . . . the pollution of the waters of this state constitutes a menace to public health and welfare, creates public nuisances . . . [and] it is hereby declared to be the public policy of this state to conserve the waters of the state and to protect, maintain, and improve the quality thereof for public water supplies . . .

Okla. Stat. Ann. tit. 27A, §2-6-102 (West Supp. 1994). In conjunction with that policy, the Oklahoma legislature has specifically granted municipalities the right to recover damages for the pollution of a municipal water supply. *Id.* at tit. 11, §§37-116 and 37-115. (West 1978 & Supp. 1994). Since Cyril's municipal water supply comes from a groundwater source, it is by definition included as a part of the waters of the state of Oklahoma. *Id.* at tit. 27A, §2-6-101(16) (West Supp. 1994).

This is precisely the situation the *Metropolitan Railroad* Court had in mind when it conditioned the application of its ruling to public nuisances which, as the Court points out, are generally offenses against the sovereign power itself:

> What may be the rule in regard to purprestures and public nuisances, by encroachments upon the highways and other public places, it is not necessary to determine. They are generally offenses against the sovereign power itself, and, as such, no length of time can protect them. Where the right of property in such places is vested in the municipality, an assertion of that right may or may not be subject to the law of limitations. We express no opinion on that point, since it may be affected by considerations which are not involved in the present case.

Metropolitan Railroad Co., 132 U.S. at 12.

B. The *Nullum Tempus* Doctrine Applies to Municipal Corporations in Oklahoma.

Oklahoma has long recognized the doctrine of *nullum tempus occurrit regi* or time does not run against the king.

This rule was first announced in Oklahoma in *Foote v. Town of Watonga*, 37 Okla. 43, 130 P. 597 (1913), which involved the property rights of the Town of Watonga:

> The generally accepted doctrine is that the maxim, *"Nullum tempus occurrit regi," is not restricted* in its application to sovereign states or governments, *but that its application extends to and includes public rights of all kinds, and that it applies to municipal corporations as trustees of the rights of the public,* and protects from invasion and encroachment the property of the municipality which is held for and devoted to public use, no matter how lax the municipal authorities may have been in asserting the rights of the public.

Id. at 598 (emphasis added). Since that time the *nullus tempus* rule has been found applicable in a long line of cases involving a variety of rights asserted by municipalities, the state, and other subdivisions of the state. *Oklahoma City Municipal Improvement Authority v. HTB, Inc.*, 769 P.2d 131 (Okla. 1989) (negligent design and construction of a municipal water system) (hereafter referred to as "HTB"); *State of Oklahoma ex rel. Jan Eric Cartwright v. Tidmore*, 674 P.2d 14 (Okla. 1983) (recovery of monies wrongfully paid from the state treasury); and, *Herndon v. Board of Com'rs in and for Pontotoc County*, 158 Okla. 14, 11 P.2d 939 (1939) (recovery of county property).

After a detailed review of the line of *nullum tempus* cases, the *HTB* court announced the present-day, general rule that:

> . . . statute of limitations shall not bar suit *by any government entity acting in its sovereign capacity* to vindicate public rights, and that *public policy*

> *requires that every reasonable presumption favor government immunity from such limitation.*

HTB, 769 P.2d at 134 (emphasis added). In a later *nullum tempus* case, the Oklahoma Supreme Court provided unequivocal clarification that "any government entity" includes municipal corporations:

> In *HTB, Inc.*, . . . we recognized that the maxim *nullum tempus occurrit regi* (time does not run against the king) applies to municipal corporations as trustees of the rights of the public.

State ex rel. Schones v. Town of Canute, 858 P.2d 436, 439 (Okla. 1993).

C. The Municipality's Dual Capacity or Function Performed Is Irrelevant To Sovereign Capacity.

Despite the *Schones* Court's announcement of the clear and unconditional holding in *HTB*, Mobil contends the proper application of the *nullum tempus* rule turns on the function performed by the municipal corporation. Petition at 9-15. In essence, Mobil's dual capacity or function performed argument is as follows: (1) municipal corporations have a dual capacity performing both governmental and proprietary functions; (2) operation of a public water supply is a proprietary function; (3) a municipal corporation only acts in a sovereign capacity, and thus the *nullum tempus* rule is applicable, when it is performing a governmental function; and, (4) therefore, since Cyril is operating a municipal water supply as a proprietary function, it is not acting in a sovereign capacity and thus the *nullum tempus* rule has no application. *Id.*

Notwithstanding that precisely the same argument was offered by the *HTB* defendants and expressly rejected by the *HTB* court, Mobil attempts to superimpose such conditions on the *HTB* facts:

> Throughout their arguments the defendants misguidedly equate the governmental/proprietary functions applicable to the principle of sovereign immunity *from* liability with the sovereign's capacity to *bring* an action. Some courts in determining whether the sovereign may claim immunity from statutes of limitation have rested their decision upon the function performed. See e.g., *Reeves v. City of Phoenix*, 1 Ariz. App. 157, 400 P.2d 364 (1965). Established principles of Oklahoma law differ, and in making such a determination the Oklahom [sic] court has focused not upon the function performed, but the ultimate right at issue. In light of the court's abrogation of the common law doctrine of sovereign immunity and the legislative response thereto which eliminated the distinction between governmental and proprietary functions, we would consider it inappropriate to repudiate the existing test in favor of a new one turning on the governmental versus proprietary function.

HTB, 769 P.2d at 134 (original emphasis).

To further dispel any notion that the function performed is not a part of the sovereign capacity determination, the *HTB* court notes that "[n]one of the litigants contest that the operation of a waterworks is a proprietary function. However, the character of the plaintiff's function does not control." *Id.* at 134-35 (citations omitted). Given this unequivocal rejection of the function

performed as a basis for determining sovereign capacity, Mobil's underlying premise is clearly misplaced:

> Since it is *only when a municipality acts in its governmental/legislative role that sovereign capacity attaches*, where a town sues alone the Court *must* examine the function involved to determine whether *part one* of the *HTB* test is satisfied.

Petition at 15 (original emphasis).

Curiously, while Mobil contends above that it is *part one* of the *HTB* test which requires determination of the governmental function in order to establish sovereign capacity, Mobil states earlier that the *HTB* court's discussion of function concerns the *second* part of the *HTB* test:

> Rather, the *HTB* Court's discussion of function concerns the *second* part of the sovereign immunity test – whether the sovereign seeks to enforce public as opposed to private rights.

Id. at 14 (original emphasis). It is not clear whether Mobil is simply confused on this issue or whether it actually believes that determination of the municipality's function is integral to both parts of the *HTB* test.[10]

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[10] Most likely Mobil is simply confused on this point as the *HTB* court clearly organized its discussion of the case. After a lengthy introduction, the court stated the general rule in the paragraph beginning with "**[1]**" at p. 134 and noted it must determine sovereign capacity and public rights. Discussion of sovereign capacity begins with the next paragraph which is designated "**[2]**" on p. 134 and continues to the middle of the second column on p. 135. At this point, the court begins its discussion of public rights with the paragraph which starts out with "[h]aving found that all plaintiffs appear in their sovereign capacity, we focus finally upon the nature of the rights

Regardless of how many times Mobil contends the function performed test must be applied, Mobil is simply attempting to impose conditions which were categorically rejected by the *HTB* court. The Tenth Circuit correctly recognized that the dual capacity of a municipality is totally extraneous to the determination of sovereign capacity and whether the *nullum tempus* doctrine is applicable. It was on this basis, along with the unequivocal statement in *Schones* that in Oklahoma the *nullum tempus* rule applies to municipal corporations, that the Tenth Circuit correctly reversed the trial court.

III. THERE IS NO REASONABLE BASIS FOR CERTIFYING THE ISSUE OF IMMUNITY FROM LIMITATIONS TO THE OKLAHOMA SUPREME COURT.

A. The Issue of Certification Was Not Properly Preserved Below.

The *nullum tempus* issue has been before the District Court on at least two occasions. It was one of two issues included in Cyril's supplemental brief in response to Mobil's motion for summary judgment, and it was the only issue included in Cyril's brief in support of its motion to reconsider. On each occasion, Mobil argued and briefed the issues before the court, but never once

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affected . . . " This discussion continues to p. 136 to the paragraph beginning with [4], but contains no discussion whatsoever of dual capacity, function performed, or any other related matters.

urged the court to certify the *nullum tempus* issue. Similarly, the *nullum tempus* issue was raised before the Tenth Circuit and Mobil responded at great length. Again, Mobil failed to urge certification. Mobil's Petition for rehearing to the Tenth Circuit was devoted exclusively to the *nullum tempus* issue, but once again, Mobil never provided any argument or authority with respect to certification. It was only in Mobil's conclusion that it stated with nothing more, "[a]t a minimum, the issue should be certified to the Oklahoma Supreme Court for resolution of this significant matter of state law."

Even assuming certification could be raised in the Tenth Circuit, since it was never raised in the District Court, it should have been raised in Mobil's answer brief on appeal, not in its petition for rehearing. According to Rule 40(a) of the Federal Rules of Appellate Procedure, the purpose of the petition for rehearing is to advise the court of points of fact or law that it has overlooked or misapprehended, not to set forth new issues for the first time. Therefore, since certification was neither argued nor briefed in either the District Court or in the Court of Appeals, it should not be considered on certiorari. *Miree v. DeKalb County, Ga.*, 433 U.S. 25, 33-34 (1977).

B. Application of the *Nullum Tempus* Rule to the Cyril Facts Is Not A Close Question.

Mobil notes briefly without comment that Oklahoma and Tenth Circuit precedent have approved application of

a two-year limitations period to cases[11] factually indistinguishable from the Cyril case. Petition at 22; *see also*, Petition at 8-9. Aside from this being support, at least according to Mobil, for certification of the *nullum tempus* issue, Mobil leaves the misimpression that the Tenth Circuit's decision in the *Town of Cyril* is inconsistent with the two cases cited.

However, careful analysis of each case reveals that the *nullum tempus* doctrine was neither raised by any of the parties nor was it considered by either court. Traditionally, review courts do not pass on issues or questions which are not raised by the pleadings or presented to and passed on by the trial court. *Von Stilli v. Young*, 203 Okla. 86, 219 P.2d 224 (1950). Thus, the *Town of Cyril* is not inconsistent with the cases cited by Mobil because it results from totally different legal issues.

The primary thrust of Mobil's argument for certification is that because of the dual capacity of municipal corporations, application of the *nullum tempus* rule results in a close legal question which should be answered by the Oklahoma Supreme Court. Petition at 18-24. Mobil would frame the question for certification as follows: " . . . whether a municipal corporation suing alone for money damages for injury to its municipal water source enjoys sovereign immunity from statutes of limitation." *Id.* at 22. This, however, was not a close question in either the District Court or Court of Appeals.

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[11] Mobil cites *Arkansas Fuel Oil Co. v. City of Blackwell*, 87 F.2d 50 (10th Cir. 1936) and *Shell Petroleum Corp. v. Town of Fairfax*, 180 Okla. 326, 69 P.2d 649 (1937).

In response to Cyril's motion to reconsider in the District Court, Mobil exhaustively argued and briefed the dual capacity/function performed issue. R. Aplt. App. 325-45. Never once did the District Court acknowledge this argument in its Order of October 13, 1992. Petition App. at 20-24. Without the benefit of *Schones* and despite substantial language to the contrary in *HTB*, the District Court was persuaded that the claims of the municipal plaintiff in *HTB*, Oklahoma City, were preserved only because they were asserted for the City's benefit by the trust plaintiffs, and thus the City was not acting in a sovereign capacity. *Id.* at 22-24.

Once *Schones* became available, and with (1) its unequivocal pronouncement that the *nullum tempus* rule in *HTB* applied to municipal corporations, and (2) the *HTB* court's explicit rejection of any dual capacity or function performed test, the Tenth Circuit panel unanimously found the *nullum tempus* doctrine was applicable. Even after an exhaustive reiteration of the *HTB/Schones* issues in Mobil's petition for rehearing, not one member of the Tenth Circuit panel or any of the other six active members of the court were persuaded rehearing was needed. *Id.* at 7-8. Accordingly, had certification been properly preserved and urged, the Court of Appeals did not abuse its discretion in failing to certify the state law issue to the Oklahoma Supreme Court because proper application of the *nullum tempus* doctrine was clearly established.

CONCLUSION

Mobil correctly points out that the issues involved are purely state law. Petition at 18. This Court does not ordinarily grant certiorari to review questions of state law. *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983). Instead, the Court " . . . generally accord[s] great deference to the interpretation and application of state law by the courts of appeal." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986). Mobil presents no reason for the Court to deviate from its usual practice in this regard. Therefore, Cyril respectfully requests that certiorari be denied.

Respectfully submitted,

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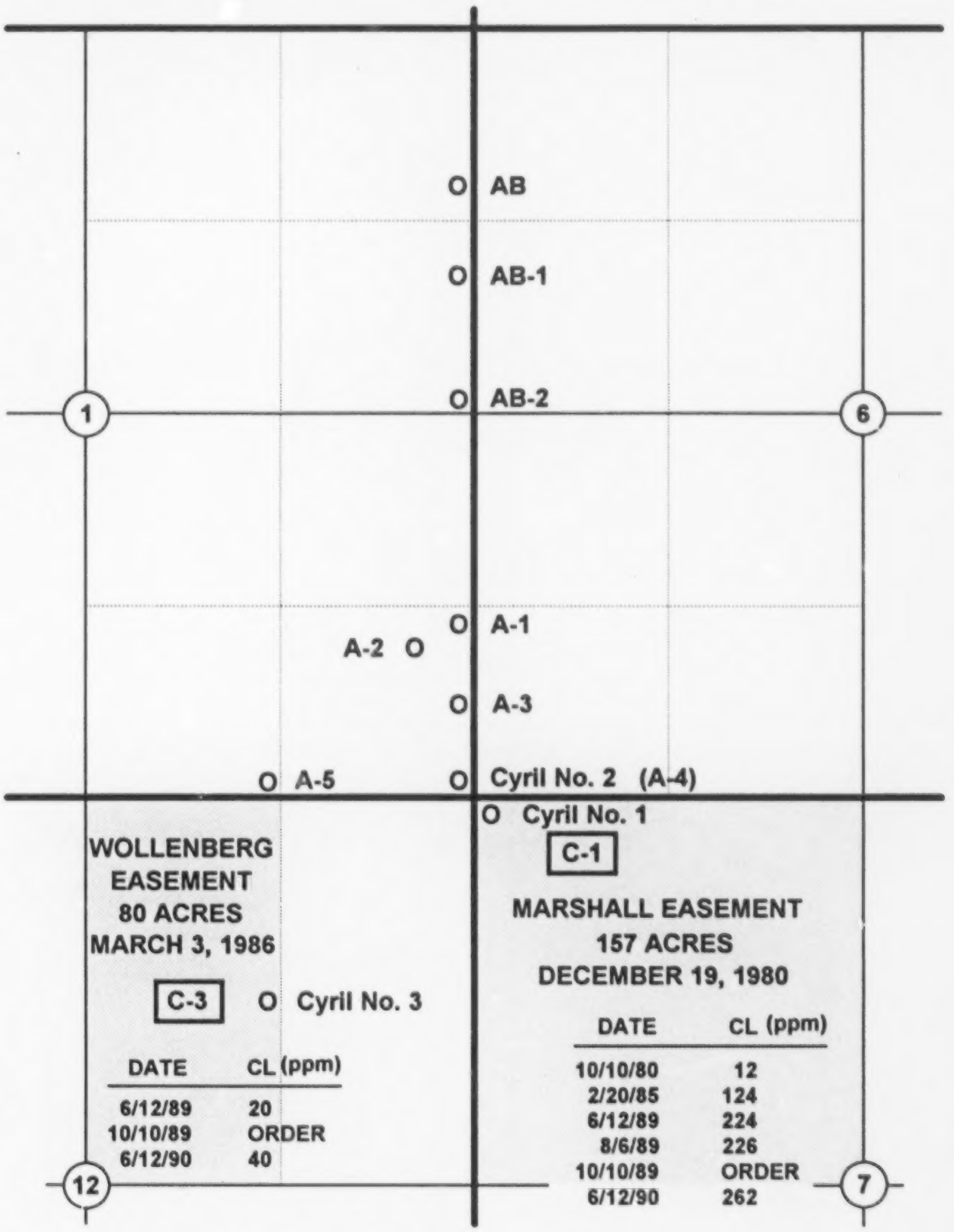
LOCATION MAP - - CYRIL WATER WELLS



LEGEND: O WATER WELL